A LETTER TO A LAWYER:

Containing an

ESSAY

To prove the

Compassing and Imagination

Of the DEATH of the

King's Brother and Heir

To be High-Treason within 25. Ed. 3.

Written by a Gentleman in the Country, and [illegible] *jesties Justices of the Peace for the County of* [illegible]

LONDON,

Printed for *John Eglesfeild*, at the Marygold in *Fleet-street*. 1685.

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Lawyer, &c.

SIR,

IN Reading ſomewhat of the Crown-Law this Vacation, I met with a Caſe of great conſequence, which occaſioned me ſome thoughts; I would deſire your Opinion thereon, my firſt Conceptions upon it I herewith ſend you: You know that by the 25*th* of *Edw.* 3. *Cap.* 2. it is ſaid to be Treaſon to Compaſs or Imagine the Death of our Lord the King, our Lady his Companion, or of their Eldeſt Son and *Heir*, &c. Upon reading of which Statute there ſeemed to me to ariſe a conſiderable Queſtion from the laſt words of that Clauſe, *viz. If a Collateral Heir be not there meant as well as Lineal?* Although

though my Lord *Coke* determines it in the Negative, yet considering how the Law stood before this Act of Parliament, and what was the general end why the Common-Law made, and this Statute allowed Compassing or Imagination of the Death of the King's Eldest Son and Heir to be High-Treason, and the equality of the mischief to the Publick in the Death of a Collateral Heir with that of a Lineal, and the necessity and design of the Law for the Preservation of the Royal Line in both these Cases: Considering these things, I cannot upon first thoughts perswade my self any other but that a Brother or Uncle being next Heir was intended by that Law as much as a Son, if there happen to be such. For it must be agreed that at the Common-Law, before this Statute, it was Treason to Kill, or to Compass the Death of the King's Heir, whether Lineal or Collateral; nay it was held to be Treason in case of any of the King's Children, or Uncle, or other near Relatives, though such were not Next, Immediate, Expectant Heir, but only of the Royal Family, and remote by some Degrees from any appearance of Succession to the Crown. And this is even agreed by *Andrew Horne* and the Lord *Coke* themselves, neither of which were such friends to the Crown as to be suspected of flattery or Bias in this particular: Now that this Statute alters not the case is plain, for it is resolved to be an Act declaratory of the Ancient Common-Law, and not introductive of a novelty; 'tis true, it is Abrogatory of all Treasons not therein expressed, and restrains Treason to the particulars which it specifies; although the words are Eldest Son and *Heir*, which is to be supposed the first Born, yet it is agreed

that

that if such first Born die without Issue, the second Son, being the Eldest *Living* is within this Law, and so of the third Son, which is a construction far from Literal, and yet consented to by all Lawyers that I have read; now such interpretation of those words (though this be in some sort a Penal Law) proceeds from the common rule in expolition of Acts of Parliament, even those which are Penal, that those cases which stand upon the same Reason shall be within the same Law, *Ubi eadem ratio ibi idem erit jus*, be the Law what it will; where there is the same Identity or Majority of Reason in any case, there ought to be the same Rule; Besides this is not such a Penal Law as is meant in that rule of Expositions of not being extended by Equity, for those Penal Laws are such only as create new Offences or inflict new Punishments, of which sort you cannot reckon this in question. For if you consider the end and design of this Law, 'twas not to either of those purposes, but to declare what things our then Law-makers thought fit to be reckoned and allowed Treason from thenceforward; then consider the end why those particulars there mentioned were agreed should be Treason for ever afterwards, and the consideration thereof will make this perspicuous, peruse the Act and take it apart or the whole together, and you will find it either to concern the Kings Person, the Kings Heirs, or the Kingly Government, the three Mischiefs designed to be prevented were, Bodily harm to the Kings most Sacred Person, the Extirpation of the Royal Family and Destruction of Kingly Government; All which three are by this Act expresly provided against; The

third

third and last in the clauses of Levying War, adhering to the Kings Enemies, Clipping or Counterfeiting Mony or the Great Seal, or Killing any of his Grand Officers there particularised, the Sole Power of making War and Peace, commanding Subjects to assist against Forreign Enemies, ordering and regulating Currant Monies, Custody and Management of the Great Seal of *England*, and consequently of Pardons, &c. the making and removing of all Publick Officers of State and Justice, being some of the Royal Prerogatives of *Brittain's* Monarch: The first is apparent in the first words of this Act, whereby it is made High-Treason so much as to think evil of the King in a Mans Heart; the second is no less manifest, although some of Republican Principles are unwilling it should be so, and therefore will say it is not so, but 'tis as plain as either of the two former which I have mentioned, for that's the end and reason why 'tis High-Treason to compass the Death of the Queen, and the Words are Emphatical, Our Lady his *Companion*, and their Heir; Then, which nothing can be more fully expressed; 'tis easie for you further to animadvert on the sense of the Words, and their Coherence; It not being placed among the Grandees of the Realm as the greatest Subject, but between the King and His Heir; And *Heir* surely is the principal thing there intended, and this Statute (you must needs imagine) designed by that clause to preserve the Royal Family and maintain the Succession, by providing a security for the Successor from all Danger as to his Person: Now a Collateral Heir is in the same plight and condition in respect of the Kingdom as a Son and Heir; and to destroy the Brother, may be of as perni-

pernicious conſequence as to cut off the Son, as is eaſy for any Man to conceive, by conſidering the diſmal effects which may happen upon either, as the Extirpation of the Royal Family, (which God forbid) which was by this Law principally meant to be preſerved, and involving the Nation in Blood and War, by rendring the Right of Succeſſion diſputable, ſo that the Miſchief that may happen in both Caſes, and that was intended to be prevented, is alike and the ſame. Then that this conſtruction is contrariant to any one rule of Law, I think no Man can affirm; if any do, I could with much facility evince its conſonancy to the rules of Law in other like Caſes, even of Statutes meerly and ſtrictly Penal, by abundance of Books; But I know you will *object* that here's a reſtrictive Clauſe. *I anſwer and confeſs, there is a Proviſo, That if any other Caſe ſuppoſed Treaſon, which is not above ſpecified, &c.* but this is ſpecified and ſufficiently expreſſed by the Word *Heir*, which was the thing chiefly intended, as I ſhew'd before in the threefold reaſon of this Act of Parliament; and a Brother or Nephew that is apparent Heir, being within the ſame reaſon and miſchief with Son and Heir, which was mentioned, becauſe he is (where there is ſuch) the firſt and next in Succeſſion, and ſo the chiefeſt of the kind is named, the reſt being meant and intended (and that in Acts of Parliament 'tis common and uſual only to mention the firſt and chiefeſt, when all manner of Perſons of that kind or ſort are underſtood, you know almoſt an hundred Caſes for it then) the *Primogenitus*, the Eldeſt Son, in the firſt place, then in default of him, the ſecond Son, becauſe then Heir, then in default of him, the third Son, for the

ſame Reaſon, becauſe Son, then Heir; and this is agreed to notwithſtanding the reſtrictive Clauſe, & *part ratione*, If no ſuch Son, &c. then Brother or Nephew, when and becauſe next immediate Apparent Heir in being. This conſtruction ſeems very natural and genuine; beſides that, were it otherwiſe, the Word *Heir* would be needleſs, and ſtand for a Cypher, for without that Word *Heir*, 'twould have been ſufficient to have ſaid Eldeſt Son, and no more, if no more had been deſigned by this Clauſe: Now I think it is a Rule in all Conſtructions, as well of Statutes as of Wills and Awards, (thoſe three receiving always one interpretation *ſecundum Intentionem*, which the very termination denotes, Parliament, Teſtament, and Arbitrement) never to expound them ſo as any Word ſhall be void and uſeleſs, if all its Words may have a meaning by another Conſtruction; And here now if *Coke*'s Conſtruction be received, *That no Heir is meant but Eldeſt Son*, then 'tis as much as if they had ſaid Eldeſt Son, that is, Eldeſt Son, and the Word Heir is ſuperfluous, for a Mans Eldeſt Son is generally reputed Heir: Beſides, this Act being in Affirmance of the Common Law, you know the Judges are not bound to that literal, ſyllabical Conſtruction, as is pretended in this Caſe; and the Law againſt Treaſons hath in all ages been conſtrued according to the Rule I mentioned of an identity in the reaſon and Miſchief: As in the Caſe of Petty Treaſon, you find in the Books, that if the Servant Kill the Wife of his Maſter, knowing her to be ſuch, 'tis adjudged Petty Treaſon by all the Judges of both Benches, becauſe there is the ſame reaſon for the one as the other, the one hath affiance in him as well as the other, and

he

he ows reverence to them both: So for a Child to Kill Father or Mother, is Petty Treason, because there's a majority of reason higher then that of a Servant, which is the Submission due from a Son to his Father, and this very branch of this Act hath had the like Construction, as that a Queen Regent is here meant, though literally She be neither within the Words King nor Queen-consort, yet because She stands under the same reason and is in the same condition with a King in respect of the Kingdom and therefore Construed so, as it was in Case of the late Queens, *Mary* and *Elizabeth*; and so the Eldest son and Heir of a Queen Regent for the same reason. Further, it is observable that the Words are *their* Heir, and yet it cannot be denied that though such Heir of the King be not Son of the Queen, but Eldest Son by a Consort deceased before He came to the Crown, yet such will be within this Statute, because within the same reason, and the Kings Eldest Daughter (there being no Son) is surely within the Law, such being the next in prospect to the Crown: And several other Constructions there are upon this Statute, of persons designed by this Statute, though not literally expressed, because *in æquali Statu*, as Keeper of the Great Seal being the same in Power and Office with Chancellor, and many more which are obvious in almost every Book: And I can see no reason why such Construction should be admitted upon one part of the Act, and so vehemently denied in this Clause; thence it seems very plain that a Collateral Heir, is as much within this Act as Son and Heir, for that upon reading of the Statute it appears, the Law-makers designed the Preservation of the Successor under the term *Heir*, which must be

meant *to the Crown*: So Sacred a reſpect had our Law-makers in thoſe days to the Divine right of Succeſſion. As for the Diſtinction of Preſumptive and Apparent, it is ſo idle and trivial that it needs not the leaſt anſwer, for they are often uſed promiſcuouſly one for the other, and a Brother whom perchance you will call preſumptive Heir is in default of a Son, as much an Heir apparent as any perſon can be (when there is ſuch) there being no intermediate Heir in being, and his Right is as Sacred and Inviolable, and his condition the ſame in reſpect of the Kingdom. For that ſaying of *non eſt hæres viventis*, it is of as little conſideration in this Caſe, for though it ſhould be agreed in ſtrictneſs true, yet the Word *Heir* ſuffices to deſcribe the perſon who is to ſucceed or inherit by Deſcent, and in the Civil Law, which Governs in moſt parts of the Civiliz'd World, is uſed for him that ſucceeds to a mans eſtate, whether he be of the blood or a ſtranger, whether he be ſo by Will or Deſcent. So that it is an emphatical name in this place for to expreſs the perſon intended by this Law to be kept from violence, even in thought: But ſome may imagine this is to make Treaſon againſt an Heir while a Subject; You know that to be otherwiſe, for the Treaſon is againſt the King as well in this Caſe as that of the Queen-conſort, and all ſuch Offences are *contra ligeantiam debitam Domino Regi*; ſo 'tis in Felony and Murder, though the Act of Violence be an immediate wrong to the Goods or Perſon of a Subject, yet the offence is againſt the Kings Peace, Crown and Dignity, for he is intereſted in the Life and Welfare of his Subjects, and being more eſpecially and perſonally concerned in thoſe of the

the Royal Family, the Law hath made ſuch Offence High-Treaſon; But perhaps you will object that the conſequence of this opinion will be to make Treaſon uncertain, and that ſuch thing as is ſo to day, may prove otherwiſe to morrow, by the Birth of a Son or the like; I anſwer that will be no inconvenience to any good Man, for every ſuch never dares to indulge himſelf in an ill thought of any of the Royal Blood, but beſides, 'twill be no more ſo upon this Conſtruction, then in the Caſe of Eldeſt Son, who dying, you agree the Second to come in his place within this Law, and the Treaſon is ſtill the ſame to Kill or to Imagine the Death of the next and immediate Apparent Heir, be the perſon who it will, whether Son, Brother, Nephew, Uncle, &c. You may perhaps further object, that this is contrary to the opinion of the Lord *Coke*, and the Lord *Hales*; For Anſwer thereto I need ſay no more than that the Reaſon of Laws, and not Authority, is the Good old Rule, *Conſulendum & judicandum legibus non dictis*; But however, if you conſult *Cokes* opinion, you will find it very odd in this particular, he ſaith, If ſuch an Heir Apparent be a Collateral Heir, (Note here that *Coke* himſelf ſtiles a Collateral Heir to be an Heir Apparent) he is not within this Law until Declared in Parliament; *i. e.* until he be declared Heir, as was *Roger Mortimer* Earl of *March*, in *Richard* the Second's time. Now how the Declaration in Parliament that ſuch a one is Heir Apparent, can make him more within this Law then he was before, I leave you to judge: and if he were within this Law after he was proclaimed next Heir, then ſurely he was before, for he was as much Heir Apparent before.

before. Then for the Lord *Hales*, 'tis true this opinion is mentioned in his Pleas of the Crown, but in the first Edition thereof it is with a *tamen quære*; but it seems, some disingenuous Dogmatist being of another mind, hath in the second Edition struck out those words *tamen quære*, unwilling to let the world know that that Great, Good Man doubted of *Cokes* opinion in this particular, and in truth it was that *tamen quære* made me first consider this matter. So that to draw to an end of this my too tedious Epistle, there seems to me neither authority nor reason against this opinion, which to my present thoughts results most plainly from the consideration of this Statute, and its design, which was to preserve the Sacred Person of the Kings most Excellent Majesty, secondly, the Royal Heir, and thirdly the Kingly Government of this Realm: The second of which includes a Brother or other Collateral as much as Son; the mischief hereby to be prevented being the same, and consequently the Reason alike in both Cases. Thus I have given you only some rude hints which at present induce me to be for the affirmative in this Question, Praying your thoughts hereupon if you have any thing to offer contrary to what I have said, or in confirmation thereof, if you agree, and to return me the same, and you'l Oblige

Your Humble Servant, &c.

[redacted]. 29. 1684.

FINIS.